STATE OF MICHIGAN

COURT OF APPEALS

GAIL ANN BAYN,

Plaintiff-Appellant,

v

DEPARTMENT OF NATURAL RESOURCES,

Defendant-Appellee.

UNPUBLISHED
May 16, 1997

No. 191185
Court of Claims
LC No. 90-13103 CM

Before: Corrigan, C.J., and Young and M.J. Talbot*, JJ.

MEMORANDUM.

This slip and fall case returns on plaintiff's appeal by right from summary disposition in favor of defendant granted by the Court of Claims. This case is being decided without oral argument pursuant to MCR 7.214(E).

To state a claim within the public building exception to governmental immunity, plaintiff must establish that the governmental agency had "actual or constructive knowledge of the defect and, for a reasonable time after acquiring knowledge, failed to remedy the condition or to take action reasonably necessary to protect the public against the condition. Knowledge of the dangerous and defective condition of the public building and time to repair the same shall be conclusively presumed when such defect existed so as to be readily apparent to an ordinary observant person for a period of 90 days or longer before the injury took place." MCL 691.1406; MSA 3.996(106). Here, the defects claimed concern use of vinyl tile for flooring, a sloped floor, and the use of a threshold five-eighths of an inch higher than allowed by building codes.

Of these, that involving the height of the threshold is irrelevant to proximate causation in the present case, there being no claim and no evidence that water pooled to a height higher than the three-quarters inch allowed for a threshold. The slope of the floor, one-sixteenth inch in one foot, mathematically represents less than one-third of one degree of arc and is not "readily apparent to an ordinary observant person," whether or not it was "apparent" to the trained eye of an architect.

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* Circuit judge, sitting on the Court of Appeals by assignment.

While the use of vinyl tile is apparent, that its use in this application is inappropriate is not, as reflected in the fact that, pursuant to this Court's prior opinion, *Bayn v DNR*, 202 Mich App 66; 507 NW2d 746 (1993), plaintiff needed experts to opine to that effect. Accordingly, in the absence of evidence that some person in authority at the DNR was aware that vinyl tile was inappropriate in this application or had actually observed, measured, or otherwise acquired knowledge of the slope in the floor, the element of actual or constructive knowledge is lacking. Where the alleged defects are not patent, *cf. Grubaugh v City of St Johns*, 82 Mich App 282; 266 NW2d 791 (1978), the lack of prior accident would seem to be relevant at least on the issue of constructive notice. In any event, on this issue plaintiff bears the burden of proof, and in opposition to defendant's motion for summary disposition plaintiff adduced no evidence to indicate that defendant possessed actual or constructive knowledge of the alleged defects. *Quinto v Cross & Peters*, 451 Mich 358, 362-363; 547 NW2d 314 (1996). Therefore, summary disposition was properly granted.

Affirmed.

/s/ Maura D. Corrigan
/s/ Robert P. Young, Jr.
/s/ Michael J. Talbot